

**Office of the
Attorney General**

**Idaho
Open Meeting Law
Manual**

**Idaho Code §§ 67-2340 through 67-2347
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INTRODUCTION

Open and honest government is fundamental to a free society. The Idaho Legislature formalized our state's commitment to open government by enacting the Idaho Open Meeting Law in 1974. The Open Meeting Law codifies a simple, but fundamental, Idaho value: The public's business ought to be done in public.

The law helps interested citizens become informed about governmental actions by guaranteeing citizens the right to observe and participate at public meetings.

One of my duties as Attorney General is to ensure that state agencies and officials comply with the Idaho Open Meeting Law. The 44 elected county prosecuting attorneys have the same duty with regard to agencies and officials of local government.

My office is committed to assisting Idaho's state and local officials in complying with their obligation under this law. Toward that end, my office regularly conducts training sessions for state and local officials throughout Idaho.

My Intergovernmental and Fiscal Law Division has prepared this updated manual for your use and reference. This manual's purpose is to inform everyone of the government's obligation and the people's rights under Idaho's Open Meeting Law. If you have further questions, feel free to call your city or county prosecuting attorney or my office at (208) 334-2400.

Sincerely,

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General

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Idaho Open Meeting Law Manual

THE ACT

(Idaho Code §§ 67-2340 through 67-2347)

67-2340. Formation of public policy at open meetings. -- The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret.

67-2341. Open public meetings -- Definitions. -- As used in this act:

(1) "Decision" means any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present, but shall not include those ministerial or administrative actions necessary to carry out a decision previously adopted in a meeting held in compliance with sections 67-2342 through 67-2346, Idaho Code.

(2) "Deliberation" means the receipt or exchange of information or opinion relating to a decision, but shall not include informal or impromptu discussions of a general nature which do not specifically relate to a matter then pending before the public agency for decision.

(3) "Executive session" means any meeting or part of a meeting of a governing body which is closed to any persons for deliberation on certain matters.

(4) "Public agency" means:

- (a) any state board, commission, department, authority, educational institution or other state agency which is created by or pursuant to statute, other than courts and their agencies and divisions, and the judicial council, and the district magistrates commission;
- (b) any regional board, commission, department or authority created by or pursuant to statute;

(c) any county, city, school district, special district, or other municipal corporation or political subdivision of the state of Idaho;

(d) any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act.

(5) "Governing body" means the members of any public agency which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter.

(6) "Meeting" means the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter.

(a) "regular meeting" means the convening of a governing body of a public agency on the date fixed by law or rule, to conduct the business of the agency.

(b) "special meeting" is a convening of the governing body of a public agency pursuant to a special call for the conduct of business as specified in the call.

67-2342. Governing Bodies -- Requirement for open public meetings.

(1) Except as provided below, all meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. No decision at a meeting of a governing body of a public agency shall be made by secret ballot.

(2) Deliberations of the board of tax appeals created in chapter 38, title 63, Idaho Code, the public utilities commission and the industrial commission in a fully submitted adjudicatory proceeding in which hearings, if any are required, have been completed, and in which the legal rights, duties or privileges of a party are to be determined are not required by this act to take place in a meeting open to the public. Such deliberations may, however, be made and/or conducted in a public meeting at the discretion of the agency.

(3) Meetings of the Idaho life and health insurance guaranty association established under chapter 43, title 41, Idaho Code, the Idaho insurance guaranty association established under chapter 36, title 41, Idaho

Code, and the surplus line association approved by the director of the Idaho department of insurance as authorized under chapter 12, title 41, Idaho Code, are not required by this act to take place in a meeting open to the public.

(4) A governing body shall not hold a meeting at any place where discrimination on the basis of race, creed, color, sex, age or national origin is practiced.

(5) All meetings may be conducted using telecommunications devices which enable all members of a governing body participating in the meeting to communicate with each other. Such devices may include, but are not limited to, telephone or video conferencing devices and similar communications equipment. Participation by a member of the governing body through telecommunications devices shall constitute presence in person by such member at the meeting; provided however, that at least one (1) member of the governing body, or the director of the public agency, or the chief administrative officer of the public agency, shall be physically present at the location designated in the meeting notice, as required under section 67-2343, Idaho Code, to ensure that the public may attend such meeting in person. The communications among members of a governing body must be audible to the public attending the meeting in person and the members of the governing body.

67-2343. Notice of meetings.

(1) Regular meetings. No less than a five (5) calendar day meeting notice shall be given unless otherwise provided by statute. Provided however, that any public agency that holds meetings at regular intervals of at least once per calendar month scheduled in advance over the course of the year may satisfy this meeting notice by giving meeting notices at least once each year of its regular meeting schedule. A forty-eight (48) hour agenda notice shall be required in advance of each regular meeting, however, additional agenda items may be added after completion of the agenda up to and including the hour of the meeting, provided that a good faith effort is made to include in the notice all agenda items known at the time to be probable items of discussion. The notice requirement for meetings and agendas shall be satisfied by posting such notices and agendas in a prominent place at the principal office of the public agency, or if no such office exists, at the building where the meeting is to be held.

(2) Special meetings. No special meeting shall be held without at least a twenty-four (24) hour meeting and agenda notice, unless an emergency exists. An emergency is a situation involving injury or damage to persons or property, or immediate financial loss, or the likelihood of such injury, damage or loss, when the notice requirements of this section would make such notice impracticable, or increase the likelihood or severity of such injury, damage or loss, and the reason for the emergency is stated at the outset of the meeting. The notice required under this section shall include at a minimum the meeting date, time, place and name of the public agency calling for the meeting. The secretary or other designee of each public agency shall maintain a list of the news media requesting notification of meetings and shall make a good faith effort to provide advance notification to them of the time and place of each meeting.

(3) Executive sessions. If an executive session only will be held, a twenty-four (24) hour meeting and agenda notice shall be given according to the notice provisions stated in subsection (2) of this section and shall state the reason and the specific provision of law authorizing the executive session.

67-2344. Written minutes of meetings.

(1) The governing body of a public agency shall provide for the taking of written minutes of all its meetings. Neither a full transcript nor a recording of the meeting is required, except as otherwise provided by law. All minutes shall be available to the public within a reasonable time after the meeting, and shall include at least the following information:

- (a) All members of the governing body present;
- (b) All motions, resolutions, orders, or ordinances proposed and their disposition;
- (c) The results of all votes, and upon the request of a member, the vote of each member, by name;

(2) Minutes of executive sessions may be limited to material the disclosure of which is not inconsistent with the provisions of section 67-2345, Idaho Code, but shall contain sufficient detail to convey the general tenor of the meeting.

67-2345. Executive sessions -- When authorized.

(1) Nothing contained in this act shall be construed to prevent, upon a two-thirds (2/3) vote recorded in the minutes of the meeting by individual vote, a governing body of a public agency from holding an executive session during any meeting, after the presiding officer has identified the authorization under this act for the holding of such executive session. An executive session may be held:

- (a) To consider hiring a public officer, employee, staff member or individual agent. This paragraph does not apply to filling a vacancy in an elective office;
- (b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student;
- (c) To conduct deliberations concerning labor negotiations or to acquire an interest in real property which is not owned by a public agency;
- (d) To consider records that are exempt from disclosure as provided in chapter 3, title 9, Idaho Code;
- (e) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations;
- (f) To consider and advise its legal representatives in pending litigation or where there is a general public awareness of probable litigation;
- (g) By the commission of pardons and parole, as provided by law.
- (h) By the sexual offender classification board, as provided by chapter 83, title 18, Idaho Code.

(2) Labor negotiations may be conducted in executive session if either side requests closed meetings. Notwithstanding the provisions of section 67-2343, Idaho Code, subsequent sessions of the negotiations may continue without further public notice.

(3) No executive session may be held for the purpose of taking any final action or making any final decision.

67-2346. Open legislative meetings required. -- All meetings of any standing, special or select committee of either house of the legislature of the state of Idaho shall be open to the public at all times, and any person may attend any meeting of a standing, special or select committee, but may participate in the committee only with the approval of the committee itself.

67-2347. Violations.

(1) If an action, or any deliberation or decision-making that leads to an action, occurs at any meeting which fails to comply with the provisions of sections 67-2340 through 67-2346, Idaho Code, such action shall be null and void.

(2) Any member of the governing body governed by the provisions of sections 67-2340 through 67-2346, Idaho Code, who knowingly conducts or participates in a meeting which violates the provisions of this act shall be subject to a fine not to exceed one hundred fifty dollars (\$150) for a first violation and not to exceed three hundred dollars (\$300) for each subsequent violation as a civil penalty.

(3) The attorney general shall have the duty to enforce this act in relation to public agencies of state government, and the prosecuting attorneys of the various counties shall have the duty to enforce this act in relation to local public agencies within their respective jurisdictions. In the event that there is reason to believe that a violation of the provisions of this act has been committed by members of a board of county commissioners or, for any other reason a county prosecuting attorney is deemed disqualified from proceeding to enforce this act, the prosecuting attorney or board of county commissioners shall seek to have a special prosecutor appointed for that purpose as provided in section 31-2603, Idaho Code.

(4) Any person affected by a violation of the provisions of this act may commence a civil action in the magistrate division of the district court of the county in which the public agency ordinarily meets, for the purpose of requiring compliance with provisions of this act. No private action brought pursuant to this subsection shall result in the assessment of a civil penalty against any member of a public agency and there shall be no private right of action for damages arising out of any violation of the provisions of sections

67-2342 through 67-2346, Idaho Code. Any suit brought for the purpose of having an action declared or determined to be null and void pursuant to subsection (1) of this section shall be commenced within thirty (30) days of the time of the violation or alleged violation of the provisions of this act. Any other suit brought under the provisions of this section shall be commenced within one hundred eighty (180) days of the time of the violation or alleged violation of the provisions of this act.

QUESTIONS AND ANSWERS

PUBLIC BODIES OR AGENCIES COVERED BY THE OPEN MEETING LAW

Question No. 1: What public bodies or agencies are subject to the Open Meeting Law?

Answer: Idaho Code § 67-2342(1) provides: "All meetings of a *governing body* of a *public agency* shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act" (Emphasis added.) "Governing body" is defined by section 67-2341(5) to mean the members of any public agency "with the authority to make decisions for or recommendations to a public agency regarding any matter." Section 67-2341(4) then defines "public agency" to encompass various categories of governmental entities and subdivisions at all levels of government. The governing bodies of public agencies which are created by or pursuant to statute as well as public agencies which are created by the Idaho Constitution are subject to the Open Meeting Law. Attorney General Opinion No. 77-30. The only public agencies which are statutorily exempt from the Open Meeting Law are the courts and their agencies and divisions, the judicial council and the district magistrates commission. Idaho Code § 67-2341(4)(a). Deliberations of the board of tax appeals, the public utilities commission and the industrial commission, in a fully submitted contested case proceeding, are also exempted from the requirement that they take place in open public meeting. Idaho Code § 67-2342.

Question No. 2: Does the Open Meeting Law apply to a public agency headed by a single individual as contrasted with a multimember body?

Answer: No. Section 67-2341(5) defines a governing body to mean "the members of any public agency *which consists of two (2) or more members*, with the authority to make decisions for or recommendations to a public agency regarding any matter." (Emphasis added.) By definition, the Open Meeting Law applies only to a governing body which consists of two or more members and thus does not apply to a public agency headed by a single individual.

Of course, it should be noted that under the Idaho Administrative Procedure Act (A.P.A.), Section 67-5201, *et seq.*, various state agencies must hold open public meetings when they adopt rules or when they determine certain contested cases. The open public meeting requirements of the A.P.A. apply regardless of whether the public agency is headed by a single individual or by a multi-member body.

Question No. 3: When is a subagency of a public agency subject to the Open Meeting Law?

Answer: A subagency of a public agency is subject to the Open Meeting Law if the subagency itself "is created by or pursuant to statute, ordinance or other legislative act." Idaho Code 67-2341(4)(d); Cathcart v. Anderson, 85 Wash. 2d 102, 530 P.2d 313 (1975); Attorney General Opinion No. 7-75. In Cathcart, the Washington Supreme Court interpreted a Washington statute similar to section 67-2341(4)(d). The court held that, under the language "created by or pursuant to," it is not necessary that a statute, ordinance or other legislative act expressly create a subagency so long as there is an enabling provision which allows that subagency to come into existence at some future time.

Question No. 4: Are advisory committees, boards and commissions subject to the Open Meeting Law?

Answer: Section 67-2341(4) defines "public agency" to include "any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act," and section 67-2341(5) defines "governing body" to include any body "with the authority to make decisions for or *recommendations* to a public agency regarding any matter." (Emphasis added.) Thus, advisory committees, boards and commissions are subject to the Open Meeting Law if the body is created by or pursuant to statute, ordinance, or other legislative act and if the body has authority to make recommendations to a public agency.

In contrast, an administrative committee, board or commission is not subject to the Open Meeting Law if it is not entrusted with the formation of public policy, but merely carries out the public policy established by a governing body, and if its activities do not constitute the making of "decisions for or recommendations to" a public agency, Idaho Water Resources Board v. Kramer, 97 Idaho 535, 548 P.2d 45 (1976). Likewise, the Open Meeting Law does not apply to voluntary, internal staff meetings if

the group is not created by or pursuant to statute, ordinance or other legislative act, even though the discussions may lead to recommendations to the governing body. *See, People v. Carlson*, 28 Ill.App.3d 569, 328 N.E.2d 675 (1975); *Bennett v. Warden*, 333 So.2d 97 (Fla. 1976). Generally, however, if you are ever unsure of whether a meeting should be open, it is this office's recommendation to err on the side of opening the meeting.

Question No. 5: Does the Open Meeting Law apply to the governor?

Answer: The Open Meeting Law has no application to the governor when he is acting in his official executive capacity, since the Open Meeting Law does not apply to a public agency headed by a single individual.

PUBLIC ACTIONS OR ACTIVITIES COVERED BY THE OPEN MEETING LAW

Question No. 6: What constitutes a meeting under the Open Meeting Law?

Answer: Section 67-2341(6) defines "meeting" to mean "the convening of a governing body of a public agency *to make a decision or to deliberate toward a decision* on any matter." (Emphasis added.) "Decision" is then defined by section 67-2341(1) to include:

. . . any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting *at which a quorum is present*. (Emphasis added.)

The term "deliberation" is defined by section 67-2341(2) and means "the receipt or exchange of information or opinion relating to a decision, but shall not include informal or impromptu discussions of a general nature which do not specifically relate to a matter then pending before the public agency for decision." (Emphasis added.) Note that this does not require any discussion or preliminary decision making. Even the receipt of information relating to a "decision" — i.e., a measure on which the governing body will have to vote — amounts to deliberation, and therefore triggers the definition and requirements of a "meeting" under the Open Meeting Law.

Question No. 7: Does the term "meeting" include such things as informal gatherings, briefing sessions, informal discussions, attendance at social functions, etc.?

Answer: As noted above, a "meeting" is the convening of a governing body to make a decision or deliberate toward a decision. Additionally, a quorum must be present. Idaho Water Resources Board v. Kramer, 97 Idaho 535, 548 P.2d 45 (1976).

The California Court of Appeals in Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 69 Cal.Rptr, discussed the dual facets of deliberation and action. 48 (Cal. App. 1968), wherein it was stated:

. . . It [California Open Meeting Law] declares the law's intent that deliberation as well as action occur openly and publicly. Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either. To "deliberate" is to examine, weigh and reflect upon the reasons for or against the choice Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision. 69 Cal. Rptr. at 485.

The California court then reasoned and ruled:

An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a non-public, pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry in discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law's design, exposing it to the very evasions it was designed to prevent. Construed in light of the Brown Act's objectives, the term "meeting" extends to informal sessions or conferences of board members designed for the discussion of public business. 69 Cal. Rptr. at 487.

A similar result was reached by the Florida Supreme Court in the case of City of Miami v. Berns, 245 So.2d 38 (Fla. 1971), wherein the Florida court ruled that public officials violate Florida's Open Meeting Law when

they meet privately or secretly and transact or agree to transact public business at a future time in a certain manner. The Florida court went on to state that, regardless of whether a meeting or gathering is formal or informal:

It is the law's intent that any meetings, relating to any matter on which foreseeable action will be taken, occur openly and publicly. 245 So.2d at 41. *See also*, Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973); Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969).

The same considerations must be applied with respect to the Idaho Open Meeting Law. Therefore, it is the opinion of the Attorney General that the provisions of the Open Meeting Law must be complied with whenever a quorum of the members of the governing body of a public agency meet in order to decide or deliberate on matters which are within the ambit of official business. Those meetings can be formal, informal, or social. So long as a quorum is present and the intent is to deliberate or make a decision, then the meeting must be open.

The requirement that the Open Meeting Law be complied with whenever a quorum of a governing body meets to deliberate or to make a decision should not be evaded by holding smaller meetings with less than a quorum present or by having a go-between contact each of the governing body members to ascertain his/her sentiment.

Question No. 8: Since any meeting of two county commissioners constitutes a quorum under Idaho law, are county commissioners prohibited from having any contact with each other outside of a duly organized open meeting?

Answer: While it is the opinion of the Attorney General that the Open Meeting Law must be complied with whenever a quorum of the members of a governing body of a public agency meet to decide or deliberate on matters which are within the ambit of official business, this office does not believe that the legislature intended for the Open Meeting Law to act as a bar to all communications between individual county commissioners outside of open meetings.

Question No. 9: Are adjudicatory deliberations exempt from the Open Meeting Law?

Answer: Only for those agencies expressly so exempted. Section 67-2342 (2) excludes the deliberations of certain agencies (the Board of Tax Appeals, the Public Utilities Commission and the Industrial Commission), in fully submitted adjudicatory proceedings, from the requirement of open public meeting. In creating this exemption for adjudicatory deliberations by only these three agencies, it appears the legislature intended that non-adjudicatory deliberations at these agencies, and all deliberations at all other agencies — i.e. except for the above-described informal or impromptu discussions of a general nature — must be conducted in a public meeting. Of course, the subject matter under adjudication may be separately identified under the Open Meeting Law as justifying a closed executive session.

Question No. 10: Can I still address questions and comments to a commissioner or board member individually related to a pending matter?

Answer: In other words, as representatives, can I still contact members of a governing body with unsolicited “information or opinion relating to a decision” that is pending before the public agency. I.C. 67-2341(2). This precise question was recently reviewed by the Idaho Supreme Court in Idaho Historic Preservation Council v. City Council of Boise, 134 Idaho 651, 8 P. 3d 646 (2000).

In the case cited above, a divided Court overturned a Boise City Council decision that allowed a corporation to demolish a building in Boise. In reviewing an appeal from the City’s Preservation Commission, members of the City Council stated at the public [open] meeting that they had received numerous telephone calls concerning the issue. Although the Court framed the issue in terms of Due Process, it may also raise open meeting questions.

In overturning the decision of the City, the Court stated:

When a governing body sits in a quasi-judicial capacity, it must confine its decision to the record produced at the public hearing, and that failing to do so violates procedural due process of law. This Court has also observed that when a governing body deviates from the public record, it essentially conducts a second fact-gathering session without proper notice, a clear violation of due process. *See Chambers v. Kootenai County Board of Commissioners*, 125 Idaho at 118, 867 P.2d at 992. Since the substance of the telephone calls received by the members of the City Council was not recorded or disclosed at the public hearing, the Commission had no opportunity to rebut any

evidence or arguments the City Council may have received from the callers.

Idaho Historic Preservation Council at 654, 8 P.3d at 649 (internal citations omitted).

The Court concluded

This decision does not hold the City Council to a standard of judicial disinterestedness. As explained above, members of the City Council are free to take phone calls from concerned citizens and listen to their opinions and arguments prior to a quasi-judicial proceeding. In order to satisfy due process, however, the identity of the callers must be disclosed, as well as a general description of what each caller said.

Id. at 656, 8 P.3d at 651.

Therefore, in the event that unsolicited information is received and considered by a governing board member, the appropriate action is to disclose the source of the information and the substance of the information so that it may be included within the public record. In sum, any information that you wish to use to form the basis of your decision must be made a part of the public record.

Question No. 11: May legal counsel meet privately with the governing body of a public agency to discuss threatened or pending litigation?

Answer: Yes. Section 67-2345(f) expressly provides that an executive session may be held "to consider and advise its legal representatives in pending litigation or where there is a general public awareness of probable litigation."

PROCEDURAL REQUIREMENTS OF THE OPEN MEETING LAW

Question No. 12: What are the notice requirements of the Open Meeting Law?

Answer: Section 67-2343 requires that no less than a five (5) calendar day meeting-notice will be given unless otherwise provided by statute. Any public agency which holds meetings at regular intervals of at least once per calendar month which are scheduled in advance over the course of the year

may satisfy this notice requirement by giving meeting notices at least once each year of its regular meeting schedule. Section 67-2343(1). There is no statutory requirement within the Open Meeting Law itself that notice be given to the general public when a "regular meeting" is held, since those are generally set forth in other statutes governing that particular entity.

With respect to "special meetings" or "executive sessions," there must be at least a twenty-four (24) hour meeting notice, unless an emergency exists. An emergency is a situation which involves injury or damage to persons or property, or immediate financial loss, or the likelihood of such injury, damage or loss, when the notice requirements of the section would make such notice impractical, or increase the likelihood or severity of such injury, damage, or loss, and the reason for the emergency is stated at the outset of the meeting. This notice and an accompanying agenda must be given by the secretary or other designee of each public agency to any representative of the news media who has requested notification of such meeting and the secretary must make a good faith effort to provide such advance notification to them of the time and place of each meeting. Idaho Code § 67-2343(2) and (3). The notice of an executive session must state the authorizing provision of law.

The notice requirement of section 67-2343 also includes the requirement of posting an agenda. With respect to "regular meetings," a forty-eight (48) hour advance agenda notice is required. Idaho Code § 67-2343(1). The addition of additional agenda items is permissible up to and including the hour of the meeting. However, care should be taken lest this practice lead to abuse. New agenda items cannot be added unless it can be shown that a good faith effort has been made to include in the published notice all agenda items known at the time to be probable items of discussion.

What constitutes an "agenda" to satisfy the posting requirement is not set forth in the Open Meeting Law. However, an "agenda" is defined in Black's Law Dictionary (6th ed.) as a "[m]emorandum of things to be done, as items of business or discussion to be brought up at a meeting; a program consisting of such items." The agenda notice requirement is not satisfied by merely posting a weekly schedule of the governing board which sets forth the time, place of the meetings, and who is participating. Rather, the notice must specifically set forth the purpose of the meeting and "items of business." Agenda items should be listed with specificity and not buried in catchall categories such as "director's report."

The notice requirement for meeting times of regular meetings and agendas is satisfied by posting such notices and agendas in a prominent place at the principal office of the public agency; if no such office exists, then at the building where the meeting is to be held. Idaho Code § 67-2343(1).

Question No. 13: May qualifications or restrictions be placed on the public's attendance at an open meeting?

Answer: A public agency may adopt reasonable rules and regulations to ensure the orderly conduct of a public meeting and to ensure orderly behavior on the part of those persons attending the meeting. In Nevens v. City of Chino, 44 Cal. Rptr. 50 (Cal. App. 1965), the court nullified a city council measure which prohibited the use of any tape recorders at city council proceedings. While acknowledging that the city council had an absolute right to adopt and enforce rules and regulations necessary to protect its public meetings, the California court held that the rule prohibiting tape recorders was too arbitrary, capricious, restrictive and unreasonable. A similar holding might be reached if a governing body prohibits the use of cameras by news and television people, if their presence is not in fact disruptive of the conduct of the meeting.

In any event, the governing standard is the reasonableness of the rules and regulations. Use of a timed agenda, "heavy gavel" and/or compliance with Robert's Rules of Order or some other procedural guideline may serve to facilitate the orderly conduct of a public meeting.

Question No. 14: Does the Open Meeting Law require the governing body of a public agency to accept public comments and testimony during meetings?

Answer: No. While other statutes, such as the Local Planning Act, may require the solicitation of public comments, the Open Meeting Law does not expressly require the opportunity for public comment. See Coalition for Responsible Government v. Bonner County, First Judicial District, Bonner County Case No. CV-97-00107 (May 15, 1997) (on file with the Office of the Attorney General).

Question No. 15: May the members of a governing body vote by secret ballot at an open meeting?

Answer: No decision at any meeting of a governing body of a public agency may be made by secret ballot. Idaho Code § 67-2342(1).

Question No. 16: If a voice vote is used, must the minutes of the meeting reflect the vote of each member of a governing body by name?

Answer: If a voice vote is taken, the minutes of the meeting must reflect the results of all votes, but the minutes need not indicate how each member voted unless a member of the governing body requests such an indication. Idaho Code § 67-2344(1)(c).

Question No. 17: May a vote be conducted by written ballots?

Answer: A vote may be conducted by written ballot, but written ballots would not comply with the Open Meeting Law unless the ballots are made available to the public on request and unless the members casting the ballots are identifiable by signature or other discernible means. Attorney General Opinion No. 77-13. The reason identification of the vote of individual members is treated differently between voice votes and votes by written ballot is that, with respect to voice votes, members of the public in attendance can readily ascertain the vote of individual members of the governing body. In contrast, a vote by written ballot is tantamount to a secret vote, unless such ballot is signed or identifies the name of the voting member.

Question No. 18: What types of records must be maintained under the Open Meeting Law?

Answer: Section 67-2344(1) requires that the governing body of a public agency must provide for the taking of written minutes of all of its meetings, but it is not necessary to make a full transcript or recording of the meeting, except as otherwise provided by law. These minutes are public records and must be made available to the general public within a reasonable time after the meeting. The minutes must include, at a minimum, the following information:

- (a) All members of the governing body present;
- (b) All motions, resolutions, orders, or ordinances proposed and their disposition;

(c) The results of all votes and, upon the request of a member of the governing body, the vote of each member by name.

Other statutes may provide more specific requirements for particular entities.

In addition, section 67-2344(2) provides that minutes of executive sessions must be made but the minutes need only contain sufficient detail to convey the general tenor of the meeting and need not contain the disclosure of material or matters which are properly the subject of executive sessions.

Question No. 19: What procedure must be followed before an executive session, closed to the public, may be held?

Answer: It must be noted that executive sessions take place only at meetings. Before any executive session may be held, there must be a valid open meeting and a vote to hold an executive session. Every such "meeting" must satisfy the notice and agenda requirements of section 67-2343. If the governing body of a public agency then wishes to consider matters which may legally be considered in a closed meeting, an executive session may be held if two-thirds (2/3) of the members vote to hold an executive session. Prior to such vote, the presiding officer must identify the authorization under the Open Meeting Law for the holding of an executive session. Then, when the vote is taken, the individual vote of each member of the governing body must be recorded in the minutes. Idaho Code § 67-2345(1).

Question No. 20: Are there any prohibitions on where a public meeting may be held?

Answer: Yes. Section 67-2342(3) specifically provides: "A governing body shall not hold a meeting at any place where discrimination on the basis of race, creed, color, sex, age or national origin is practiced." Thus, for example, a public meeting may not be held at a private club if the private club excludes women from membership, even if women are allowed entrance for the purpose of attending the meeting.

Question No. 21: Does the Open Meeting Law permit holding a meeting by telephone conference call?

Answer: Yes. The Open Meeting Law specifically authorizes the holding of a meeting by telephone conference call. In order to comply with Idaho Code § 67-2342(5), at least one member of the governing body or the

director or chief administrative officer must be physically present at the meeting location designated in the meeting notice as required under Idaho Code § 67-2343. Additionally, the communications among the members of the governing body must be audible to all persons attending the meeting. Care should also be taken to insure that votes are not made in such a way to permit an illegal secret ballot or vote.

SPECIFIC STATUTORY EXEMPTIONS: EXECUTIVE SESSIONS

Question No. 22: What types of meetings may be closed under the Open Meeting Law?

Answer: A closed meeting--that is, an executive session--may be held:

- (a) To consider hiring a public officer, employee, staff member or agent, unless a vacancy in an elective office is being filled;
- (b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member, individual agent or public school student;
- (c) To conduct deliberations concerning labor negotiations or to acquire an interest in real property which is not owned by a public agency;
- (d) To consider records that are exempt by law from public inspection;
- (e) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations. Idaho Code § 67-2345(1);
- (f) To consider and advise its legal representatives in pending litigation or where there is a general public awareness of probable litigation.

This provision enumerates *specific* and not general statutory exemptions to the requirement of conducting an open meeting. It is the Attorney General's opinion that a public agency *cannot* conduct an executive

session to consider general personnel matters, but can only meet in executive session to consider those specifically enumerated personnel matters found at section 67-2345(1)(a) and (b); that is, "to consider hiring a public officer, staff member or agent . . .," or "to consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member, individual agent or public school student."

With respect to labor negotiations, section 67-2345(2) specifically provides that labor negotiations may be conducted in executive session if either side requests closed meetings. Further, any subsequent negotiation sessions may continue without further public notice, notwithstanding the notice requirements of section 67-2343.

An executive session may be held to consider acquiring an interest in real property that is not owned by a public agency. However, an executive session cannot be held for the purpose of acquiring an interest in real property owned by a public agency. Attorney General Opinion No. 81-15.

It should be noted that the Open Meeting Law establishes circumstances where executive sessions are permissible. The act in no way requires any closed meetings. In addition, even though certain enumerated matters may be "considered" in an executive session, it must be emphasized that: "[N]o executive session may be held for the purpose of taking any final action or making any final decision." Idaho Code § 67-2345(3); Attorney General Opinion No. 77-44; Attorney General Opinion No. 81-15.

It is important to remember that section 67-2345(1) sets forth specific procedural steps to be followed in order to have a valid executive session. Failure to do so will invalidate any action taken as a result of the executive session. Additionally, it may subject the board members to liability for those actions. Procedurally, the presiding officer must identify the specific authorization under the Open Meeting Law for the holding of an executive session and at least a two-thirds (2/3) vote in favor of the executive session must be recorded in the minutes of the meeting by individual vote.

Question No. 23: If a more specific statute requires open meetings and has no provision for executive sessions, is the executive session provision of the Open Meeting Law still applicable?

Answer: Yes. The executive session provision takes precedence over other statutes which may apply to a particular entity. Thus, even if a statute

requires all meetings of a public body to be open, executive sessions may still be held. Nelson v. Boundary County, 109 Idaho 205, 706 P.2d 94 (Ct. App. 1985).

PENALTIES FOR NONCOMPLIANCE

Question No. 24: What is the validity of action taken in violation of the Open Meeting Law?

Answer: If an action, or any deliberation or decision-making that leads to an action, occurs at any meeting which fails to comply with the provisions of the Open Meeting Law, such an action will be null and void. If any member of the governing body taking such an action, or participating in any such deliberation or decision making, knowingly conducts or participates in a meeting which violates the provisions of the Open Meeting Law, that member will be subject to a fine not to exceed One Hundred Fifty Dollars (\$150) for the first violation and not to exceed Three Hundred Dollars (\$300) each for subsequent violations. Idaho Code § 67-2347(1) and (2). It is the opinion of the Attorney General that the Idaho Legislature intended that such fines be paid by the individual member of the governing body, not the governing body itself.

Question No. 25: Who enforces the Open Meeting Law?

Answer: Any citizen affected by a violation of the Open Meeting Law is entitled to bring a lawsuit in the magistrates' division of the county in which the public agency normally meets for the purpose of requiring compliance with the provisions of the Open Meeting Law. The lawsuit would ask the court to declare any improper actions void and to enjoin the governing body from violating the Open Meeting Law in the future. Such a lawsuit must be commenced within thirty (30) days of the time of the violations or the alleged violation of the provisions of the Open Meeting Law. Any other lawsuit must be commenced within one hundred eighty (180) days of the time of the violation. Idaho Code § 67-2347(4).

Section 67-2347(3) obligates the Attorney General to enforce the Open Meeting Law in relation to the public agencies of state government, and the prosecuting attorneys of the various counties to enforce the Open Meeting Law in relation to the local public agencies within their respective jurisdictions.

Question No. 26: If there is a violation of the Open Meeting Law at an early stage in the process, will all subsequent actions be null and void?

Answer: Yes. Section 67-2347(1) clearly indicates that an action, or any deliberation or decision-making that leads to an action, which occurs at any meeting not in compliance with the provisions of the Open Meeting Law will be null and void. The 1992 legislature added the "deliberation or decision-making that leads to an action" language to the provisions of section 67-2347(1). This language clarifies the consequences of a violation under the previous requirement.

The Idaho Supreme Court has held that the procedure for voiding actions taken in violation of the Open Meeting Law must be read literally. Thus, any action may not be declared void if it is not challenged within the thirty-day time limit established by Idaho Code § 67-2347(4). Petersen v. Franklin County, 130 Idaho 176, 938 P.2d 1214 (1997).

Question No. 27: If a violation of the Open Meeting Law occurs, what can a public body do to correct the error?

Answer: A public body may at any time correct errors by repeating the process in compliance with the law. While the Open Meeting Law provides that noncompliance voids any action taken, it does not prohibit corrective action at any later date.

Question No. 28: Are members of the governing body of a public agency criminally liable for violations of the Open Meeting Law in which they knowingly participate?

Answer: The Open Meeting Law specifically creates fines for violations of the Open Meeting Law where members knowingly conduct or participate in meetings which are in violation of the Open Meeting Law. The Open Meeting Law does not expressly provide for criminal liability for violations of which members have knowledge. Nonetheless, it is possible that a member of a governing body may be guilty of a misdemeanor for violations of the Open Meeting Law in which he or she knowingly participates.

Section 18-315 provides:

Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor.

Section 18-317 states:

When an act or omission is declared by a statute to be a public offense and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor.

In Alder v. City Council of City of Culver City, 7 Cal. Rptr. 805 (Cal. App. 1960), the court considered the California Open Meeting Law (the Brown Act) which included no penalty provisions or provisions for enforcement when violations occur. Relying on two California statutes identical to Idaho Code sections 18-315 and 18-317, the California court ruled that violations of the Open Meeting Law were punishable as misdemeanors even though the Open Meeting Law did not expressly make violations punishable as misdemeanors.



IF IN DOUBT, OPEN THE MEETING.

TABLE OF OPEN MEETING LAW CASES

1. Petersen v. Franklin County, 130 Idaho 176, 938 P.2d 1214 (1997) (actions that violate Open Meeting Law that are not challenged within the time limit established by Idaho Code § 67-2347(4) are not void).
2. Student Loan Fund of Idaho, Inc. v. Payette County, 125 Idaho 824, 875 P.2d 236 (Ct. App. 1994) (merely alleging violation of Open Meeting Law, without additionally alleging a specific “palpable injury,” is insufficient to confer standing).
3. Gardner v. Evans, 110 Idaho 925, 719 P.2d 1185 (1986) (an aggrieved party will not prevail in a claim for improper notice under the Open Meeting Law when they cannot demonstrate any disadvantage stemming from the deficient notice).
4. Nelson v. Boundary County, 109 Idaho 205, 706 P.2d 94 (Ct. App. 1985) (Open Meeting Law’s provisions authorizing executive sessions preempt Idaho Code § 31-703’s requirement that all meetings of county commissioners must be public).
5. Gardner v. School Dist. No. 55, 108 Idaho 434, 700 P.2d 56 (1985).
6. Baker v. Ind. School Dist. of Emmett, 107 Idaho 608, 691 P.2d 1223 (1984).
7. State v. City of Hailey, 102 Idaho 511, 633 P.2d 576 (1981).
8. Idaho Water Resources Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).
9. Coalition for Responsible Government v. Bonner County, First Judicial District, Bonner County Case No. CV-97-00107 (May 15, 1997) (insufficient notice in agenda may trigger Open Meeting Law violation) (on file with the Office of the Attorney General).
10. State v. Thorne, et al.; Idaho Fourth Judicial District No. 3L-97763 (1994).